

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

November 2, 1934.

CHEAH WONG NYAN and CHEAH SIN KEE
Plaintiffs.

vs.

1. K.A.L.R.M. PALANIAPPA
2. CHEAH LEAN GUAN
3. OFFICIAL ASSIGNEE OF THE PROPERTY OF CHEAH LEAN GUAN a bankrupt.

Defendants.

[PENANG SUIT No. 101 of 1934]

Practice—Judgment obtained by fraud and collusion—Fresh action to set aside judgment—jurisdiction.

A. lent money to B. on a promissory note signed by him in his capacity of executor of the estate of a deceased person. In fact, the executor had no power to borrow for the estate. By way of an Originating Summons A. applied to the Court to be paid the amount of his claim out of the funds in the hands of the Deputy Accountant General belonging to the Estate. The Summons, upon the objection of the beneficiaries of the Estate who had contended that the executor was personally liable, was withdrawn. A. then sued B. to recover the debt purported to have been contracted by the latter on behalf of the Estate. At the time of the hearing of an application for final judgment, B. was an undischarged bankrupt, but this fact as also the fact that the beneficiaries had previously contended that A. had no legal claim against the Estate was not brought to the notice of the Court. B. consented to judgment "*de bonis testatoris*" being entered, in the absence of and without authority from the beneficiaries. In a separate action by certain of the beneficiaries to set aside the judgment—

Held, that the judgment was obtained by fraud and collusion and the Court in a fresh action to set aside the judgment had jurisdiction to set it aside.

Action heard before Whitley, J. on the 27th of September and 8th October, 1934.

Ross for the plaintiffs.

Conaghan for the 1st defendant.

Huck Lim for the 2nd defendant.

E. N. Taylor, Official Assignee, in person.

Cur. Ad. Vult.

WHITLEY, J.—This was an action to set aside a judgment. The Plaintiffs are beneficiaries under the Will of Cheah Choon Seng deceased and in the course of the hearing they obtained an Order whereby they were appointed to represent all the beneficiaries under that Will. The second Defendant who is bankrupt is the sole trustee of the Will. The first Defendant is a moneylender. The third Defendant is joined as the Official Assignee of the property of the Second Defendant and is willing to submit to any order.

Cheah Choon Seng died on the 4th February 1916 and the second Defendant became the trustee in 1921 in the place of Cheah Hee Nyan retired.

On the 31st December 1928 the second Defendant borrowed from the first Defendant the sum of \$6,000 with interest at \$1.10 per \$100 upon a promissory note payable on demand signed by the second Defendant with the addition beneath his signature of the words "Trustee of the Estate of Cheah Choon Seng deceased" stamped with a rubber stamp.

On the 5th January 1934 in Originating Summons No. 142 of 1933, the first Defendant supported by his own affidavit and that of the second Defendant, applied for an order that the Deputy Accountant General Penang be directed to pay to him the sum of \$4,846.96 being the amount of principal and interest due on this note from the Estate of the deceased. The matter came before Savage Bailey, J. on the 12th January 1934. Both first and second Defendants were then represented by different solicitors from those who appear for them in the present action. Messrs. Ross and Hogan attended in Chambers on behalf of certain beneficiaries and objected to the application on the grounds that the debtor was personally liable and not the Estate of the deceased. The Summons was withdrawn by the applicant's (the present first Defendant's) then solicitor.

On the 6th February 1934 in Suit No. 26 of 1934, the first Defendant instituted proceedings against the second Defendant as trustee for the recovery of the sum due on the note. The second Defendant entered an appearance through his then solicitor without notifying any of the beneficiaries. Thereupon the first Defendant applied for leave to enter judgment and swore an affidavit in support stating that the second Defendant as trustee of the Estate was so indebted. On the 8th March 1934, the first Defendant with the consent of the second Defendant and in the absence of anyone representing the beneficiaries obtained leave to enter final judgment against the second Defendant as such trustee and on the 16th March 1934 the first Defendant entered judgment against the second Defendant in the common form used against an executor. This is the judgment which it is sought to set aside.

All the foregoing facts are admitted.

The Plaintiffs contend that the judgment was obtained secretly and collusively against the Estate at a time when the second Defendant was a bankrupt and that he consented to the judgment in order to evade liability himself and in fraud of the beneficiaries of the Estate.

The first and second Defendants deny any fraud, secrecy or collusion and contend that the money was borrowed for the purposes of the Estate and used to reduce the Estate's overdraft. Entries in the book support this contention but on the other hand it would appear doubtful

whether the Estate derived any real benefit from the transaction inasmuch as no overdraft might have been necessary had it not been for repeated heavy drawings by the second Defendant. However it is not now necessary to decide that question which would only become material if and when the second Defendant seeks to be indemnified by the estate.

It is well settled law that upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as executor against the assets of the testator and the following passages from the judgment of James, L.J. in the leading case of *Farhall v. Farhall*, L.R. 7 Ch. Appeal Cases at page 125 state the law very clearly:—

"In this case it seems to me quite clear that there was no legal debt from the estate to the Bank. The executrix borrows money as executrix, says that she is executrix, and the Bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent".....

"But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate."

The first Defendant was no doubt under the impression that he was lending money to the Estate but it is admitted that the executor had no power to borrow on behalf of the Estate and if the first Defendant so lent in ignorance of what his legal rights would be and without ascertaining whether the executor had such power he did so at his own risk.

It is thus clear that the first Defendant was not entitled to the judgment which he obtained against the second Defendant as executor. The judgment should have been "*de bonis propriis*" and not "*de bonis testatoris*." It should not be allowed to stand and that being so the only question for me to decide is whether the Plaintiffs have adopted the correct procedure to remedy the matter.

The Court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a rehearing. *Cole v. Langford* (1898) 2 Q.B. 36 and *Priestman v. Thomas* (1884) 9 P.D. 210. In the latter case a compromise was effected in an action in the Probate Division under which a

certain will was admitted to probate. Afterwards it was discovered that the will was a forgery and an action was brought against the parties who had propounded the will claiming that the compromise might be set aside on the ground of fraud. The jury having found that the compromise was procured by fraud, judgment was given setting aside the compromise. One of the earliest pronouncements of this principle was made by Lord Coke in the *Duchess of Kingston's Case*, (1776) 2 Sm. L.C. 12th Edition at page 762 where he observed that acts of the highest judicial authority though not to be impeached from within yet are impeachable from without for although it is not permitted to show that the court was mistaken it may be shown that they were misled. "Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of courts of justice. It avoids all judicial acts, ecclesiastical or temporal." Accordingly, as stated in *Spencer Bower on Actionable Misrepresentation* 2nd Edition p. 358, when both parties colluded and conspired to deceive the court judgments have at the suit of a stranger interested been set aside on proof of the requisite facts. It would thus appear clear that the Plaintiffs who are admittedly interested strangers are entitled to have this judgment set aside if they can satisfy the Court that it was obtained by fraud and collusion.

It remains to be considered what degree of fraud and collusion it is necessary to prove in such a case. In *Meddowcroft v. Huguerin*, 13 English Reports at page 356 Lord Brougham described a collusion suit as being not a real judgment but something obtained by fraud from the Court which is not binding. In that case however it was held that the collusion alleged even if proved was insufficient inasmuch as "all the circumstances which would have given materiality were brought before the Judge." Applying that test in the present case I am emphatically of the opinion that the fact that the beneficiaries had contended before the Judge that the Executor must be liable personally and not the estate was a very material circumstance which was not brought to the attention of the Registrar.

Again in the case of *Patch v. Ward*, L.R. 3 Ch. Appeal Cases at page 207 Lord Cairns L.J. after quoting the passages from Lord Coke's judgment to which I have already referred proceeded as follows:—

"The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him,...

.....I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled."

Sir John Rolt L.J. in his judgment used the following words:—

"Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead without any such intention or contrivance, would probably not be sufficient—at all events I think could not after such delay as has occurred in this case, be deemed sufficient to set aside the order which has been made."

Applying these principles I am of the opinion that in the present case there is evidence of a fraud upon the Court which went beyond mere constructive fraud. At the proceedings before the Judge in Chambers the first and second Defendants had it directly brought to their notice that the beneficiaries contended that the Estate could not be liable and that judgment could only be recovered against the executor personally and reference to any text book must have shown them that that contention was well founded. But the second Defendant being bankrupt a judgment against him would be valueless, so the first Defendant persisted in his attempt to recover judgment against the Estate and went before the Registrar with his affidavit in which he swore that the Defendant as trustee of the Estate had no defence whatsoever to the claim and had entered appearance merely for the purpose of gaining time. He did not disclose the fact that the executor was bankrupt. The second Defendant did not allow judgment to go by default. He entered appearance, appeared before the Registrar, and consented to judgment against the Estate although he was also well aware of the beneficiaries' contention that the Estate could not be liable. This in my view was clearly collusion.

The Registrar was not informed of the contention of the beneficiaries which had been

put forward before the Judge—if he had been it is unthinkable that he would have given leave to enter judgment without giving them an opportunity of being heard. He would naturally conclude from the executor consenting to judgment that the interests of the beneficiaries were being properly represented by the executor and that there was no available defence to the claim. Viewed in its most favourable light that constituted a regrettable lack of frankness towards the Court; but I would go much further than that and say that in the circumstances of this particular case it amounted to a fraud on the Court such as is described by the Lords Justices in the case of *Patch v. Ward* "a fraud which you can explain and define upon the face of a decree—a meditated and intentional contrivance to keep the Court in ignorance of the real facts of the case and obtaining the decree by that contrivance." It was certainly more than "mere constructive fraud not originating in actual contrivance but consisting of acts tending possibly to deceive or mislead without any intention or contrivance."

As to the proper practice when a person who is not a party to the record seeks to set aside a judgment by which he is injuriously affected, I was referred to *Jacques v. Harrison*, 12 Q.B.D. 165 but that was a case in which the Defendant in the action had allowed judgment to go by default and there was no suggestion of collusion.

In the present case I am satisfied that the judgment was obtained by collusion between the parties, by a fraud on the Court in concealing the true position of affairs and by secrecy in obtaining the judgment behind the backs of those whom the parties knew to be vitally interested namely the beneficiaries. I should like to make it clear that the fraud which I find was fraud in the legal sense of the word and not 'criminal' fraud.

There will be judgment for the Plaintiffs with costs against the first and second Defendants.

Solicitors for the Plaintiff—

Logan Ross & Samuel.

Solicitors for the 1st Defendant—

Wreford & Thornton.

Solicitors for the 2nd Defendant—

Huck Lim & Hock Soo.